Hj Afifi bin Hj Hassan v Norman Disney & Young Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING UP) NO D-28–216 OF 2009
AZIZAH NAWAWI JC
20 MAY 2013

Companies and Corporations — Winding up — Application for — Petition under s 218 — Elaborate scheme established to meet statutory requirements — Whether agreements entered into by parties illegal ab initio — Whether executed to circumvent statutory requirements — Public policy — Whether company illegal — Whether company must be wound up — Whether court should assist — Companies Act 1965 s 218(1)(f) & (i)

The first respondent company ('the company') carried on business as a professional engineer registered under the Registration of Engineers Act 1967 ('the Act'). Under s 7A(3) of the Act, the Board of Engineers may allow a company to practice as consulting engineers if the company has a Board of Directors comprising professional engineers. Under s 10(4) of the same Act, only citizens or permanent residents of Malaysia may be registered as professional engineers. In order to meet the statutory requirements under the Act, an elaborate scheme was implemented. The petitioner held 65% of the issued capital of the company. The petitioner contended that the said agreements which allowed the petitioner to own 65% shares of the company were illegal ab initio as they were executed to circumvent the statutory requirements of the Act and were contrary to public policy. Therefore, it was submitted that the company was illegal and that the company must be wound up under s 218(1)(f) and (i) of the Companies Act 1965 ('CA') in order to terminate the illegality. The respondents argued that the court should dismiss the petition as the court should not assist the petitioner as he was a party to the fraudulent arrangements and stood to benefit from the winding up of the company. It was further submitted that the courts should refrain from taking sides in disputes between fraudulent parties and to leave the enforcement of the laws to the relevant authorities pertaining to the compliance of the Act.

Held, allowing the application:

(1) The company was carrying on business and was continuing to carry on business in an illegal manner in direct contravention of ss 7A(3) and 10(4) of the Act. The elaborate scheme created an 'Ali Baba' type of company where control of the company was still vested in the hands of the foreigners under the powers of attorney. The petitioner was nothing,

but more a facade of the company. The establishment of such 'Ali Baba' companies was illegal as it was against Malaysian public policy. Since the object of the said agreements was against ss 7A(3) and 10(4) of the Act, the said agreements were illegal ab initio (see paras 13–14).

(2) The court was duty bound to address the illegality issue, regardless of whether the fraudulent party was set to be the ultimate beneficiary. However, in the present case, the petitioner, the company and the first respondent were privy to the fraudulent and illegal acts. On the illegality issue, if the winding up order was not granted, the company would continue to exist and carry on its business in blatant disregard of the Act. To allow the company to continue operation would tantamount to a continuing illegality and this was clearly against the Act. Therefore, the court must act on the illegality, and if the illegality could be terminated through the winding up proceedings, then the orders must be granted. The court could not endorse the existence of a company tainted with illegality. In this case, it was not so much that the court was enforcing the petitioner's rights, but rather, the court was just upholding the law (see paras 21–23).

(3) There was no provision in the CA which required the court to consider the availability of alternative remedy before making a winding up order. It was just and equitable to wind-up the company pursuant to s 218(1)(i) of the CA on the grounds that the carrying on of business by the company was illegal and in breach of the statutory requirements of the Act. The company was ordered by the court to be wound up (see paras 24–25).

[Bahasa Malaysia summary

Syarikat responden pertama ('syarikat') menjalankan perniagaan sebagai seorang jurutera profesional yang berdaftar di bawah Akta Pendaftaran Jurutera 1967 ('Akta'). Di bawah s 7A(3) Akta, Lembaga Jurutera boleh membenarkan syarikat untuk menjalankan amalan sebagai jurutera perunding jika syarikat itu mempunyai Lembaga Pengarah yang terdiri daripada jurutera profesional. Di bawah s 10(4) Akta yang sama, hanya rakyat atau penduduk tetap Malaysia boleh didaftarkan sebagai jurutera profesional. Dalam usaha untuk memenuhi keperluan undang-undang di bawah Akta, skim terperinci telah dilaksanakan. Pempetisyen memegang 65 % daripada modal yang dikeluarkan syarikat itu. Pempetisyen mendakwa bahawa perjanjian yang membenarkan pempetisyen untuk memiliki 65% saham syarikat itu adalah menyalahi undang-undang ab initio kerana ia telah dilaksanakan untuk menghindari keperluan berkanun Akta dan bertentangan dengan dasar awam. Oleh itu, ia telah dikemukakan bahawa syarikat itu tidak sah dan syarikat hendaklah digulung di bawah s 218(1)(f) dan (i) Akta Syarikat 1965 ('AS') untuk menamatkan kesalahan undang-undang. Responden berhujah bahawa mahkamah sepatutnya menolak petisyen itu kerana mahkamah tidak harus membantu pempetisyen kerana dia adalah suatu pihak kepada perkiraan

penipuan dan bakal mendapat manfaat daripada penggulungan syarikat. Responden telah berhujah bahawa mahkamah perlu menahan daripada memihak kepada suatu pihak dalam pertikaian antara pihak-pihak penipuan dan meninggalkan penguatkuasaan undang-undang kepada pihak berkuasa yang berkaitan berkenaan pematuhan Akta.

Diputuskan, membenarkan permohonan:

(1) Syarikat menjalankan perniagaan dan telah berterusan untuk menjalankan perniagaan secara haram dalam perlanggaran langsung dengan ss 7A(3) dan 10(4) Akta. Skim terperinci telah membentuk sejenis syarikat 'Ali Baba' di mana kawalan syarikat itu masih terletak pada hak tangan orang asing di bawah surat kuasa wakil. Pempetisyen bukan apa-apa, tetapi lebih merupakan syarikat fasad. Penubuhan syarikat-syarikat 'Ali Baba' itu adalah menyalahi undang-undang kerana ia adalah bertentangan dengan dasar awam Malaysia. Memandangkan tujuan perjanjian tersebut bertentangan ss 7A(3) dan 10(4) Akta, perjanjian tersebut adalah menyalahi undang-undang ab initio (lihat perenggan 13–14).

(2) Mahkamah berkewajipan untuk menangani isu menyalahi undang-undang, tidak kira sama ada parti penipuan bersedia untuk menjadi benefisiari muktamad. Walau bagaimanapun, dalam kes ini, pempetisyen, syarikat dan responden pertama telah mengetahui terdapat tindakan penipuan dan menyalahi undang-undang. Mengenai isu menyalahi undang-undang, jika perintah penggulungan tidak diberikan, syarikat itu akan terus wujud dan menjalankan perniagaannya secara terang-terangan tidak menghormati Akta. Untuk membolehkan syarikat itu untuk meneruskan operasi merupakan kesalahan undang-undang yang berterusan dan ini jelas bertentangan dengan Akta. Oleh itu, mahkamah perlu bertindak atas kesalahan undang-undang tersebut, dan jika kesalahan undang-undang boleh ditamatkan melalui prosiding penggulungan, maka perintah hendaklah diberikan. Mahkamah tidak boleh menyokong kewujudan sebuah syarikat yang dicemari dengan kesalahan undang-undang. Dalam kes ini, mahkamah tidak begitu banyak menguatkuasakan hak pempetisyen, tetapi sebaliknya, mahkamah hanya menegakkan undang-undang (lihat perenggan 21–23).

(3) Tiada peruntukan dalam AS yang memerlukan mahkamah untuk mempertimbangkan adanya remedi alternatif sebelum membuat suatu perintah penggulungan. Ia adalah adil dan saksama untuk menggulungkan syarikat menurut s 218(1)(i) AS atas alasan bahawa perniagaan yang dijalankan oleh syarikat itu menyalahi undang-undang

dan melanggar syarat-syarat berkanun Akta. Mahkamah telah mengarahkan syarikat tersebut untuk digulung (lihat perenggan 24–25).]

Notes

For cases on application for winding up, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1185–1198.

Cases referred to

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457; [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1, PC (refd)

Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281; [1992] 3 CLJ 1667, SC (refd)

Lim Yoke Kian & Anor v Castle Development Sdn Bhd [2000] 4 MLJ 443; [2000] 3 CLJ 369, CA (refd)

Norman Disney & Young v Affifi Hj Hassan [2010] MLJU 543; [2011] 1 CLJ 210, HC (refd)

Perbadanan Pertanian Selangor v Megafores Sdn Bhd & Ors [2010] MLJU 1572; [2011] 8 CLJ 484, HC (folld)

Thomas Edward Brinsmead & Sons Ltd, Re [1897] 1 Ch 406, CA (refd)

Thong Foo Ching & Ors v Shigenori Ono [1998] 4 MLJ 585; [1998] 4 CLJ 674, CA (refd)

Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd [1995] 1 MLJ 769, SC (folld)

Legislation referred to

Companies Act 1965 s 218(1)(f), (1)(i)
Contracts Act 1950 s 24(a), (b), (e)
Registration of Engineers Act 1967 ss 7A(3), 10(4)

Lim Kian Leong (Tan Wei Wei with him) (Lim Kian Leong & Co) for the plaintiff.
WSW Davidson (Azman Davidson & Co) for the second, third and fourth defendants.

Azizah Nawawi JC:

PETITION

[1] The petition seeks to wind up the first respondent company ('the

Company') under s 218(1)(f) and 218(1)(i) of the Companies Act 1965 ('Act 125') on the basis that:

(a) the directors have acted unfairly or unjustly in the affairs of the company and acted in their interests rather than the interests of the members as a whole; and

(b) it is just and equitable that the company be wound up.

[2] The respondents opposed the petition and upon reading the petition, the affidavits filed and the submissions of parties, I had allowed the application on 18 March 2013 and the company was accordingly wound up.

[3] The respondent has since filed a notice of appeal against the said decision and I now give my full grounds.

THE GROUNDS OF THE PETITION

[4] The petition to wind up the company is premised on the following grounds:

(i) deception and misrepresentation by the directors of the company to the authorities, clients and public by presenting the company as owned and controlled by a Bumiputra;

(ii) failure of substratum of the company;

(iii) Unjustifiable removal of the petitioner as the director of the company under the guise of non attendance of board meetings;

(iv) unjustified failure to pay dividends and/or profits;

(v) breach of common law and/or statutory duties by the second, third and fourth respondents as the directors of the company;

(vi) unauthorised continual re-election of the second respondent as the director and chairman of the company;

(vii) unauthorised appointment of the third and fourth respondents as directors at board meetings and unauthorised re-appointment of third respondent as director at subsequent board meetings;

(viii) splitting of shares by second respondent to third and fourth respondents for improper and collateral purposes;

(ix) management deadlock;

(x) justifiable loss of confidence in management;

(xi) irretrievable breakdown of mutual trust and confidence between the petitioner, second, third and fourth respondents; and

(xii) receipt of excessive directors' remuneration by the second, third and fourth respondents.

THE SALIENT FACTS

[5] The company carried on business as a professional engineer and is registered under the Registration of Engineers Act 1967. Under s 7A(3) of the Registration of Engineers Act 1967, the Board of Engineers may allow a company to practice as consulting engineers if the company has a board of directors comprising of professional engineers. Under s 10(4)) of the same Act, only citizens or permanent residents of Malaysia may be registered as professional engineers.

[6] In order to meet these statutory requirements under the Registration of Engineers Act 1967, an elaborate scheme was implemented which resulted in the petitioner holding 65% of the issued capital of the company. This elaborate scheme involves the petitioner, the company and the second respondent. The said scheme comprised of the following agreements:-

(i) a sale and purchase agreement between Liew Yan Sin ('LYS') and the petitioner for the sale of 60,000 ordinary shares ('60,000') held by LYS to the petitioner;

(ii) a loan agreement between the petitioner (as borrower) and LYS, as the lender in respect of the 60,000 shares;

(iii) a shareholders agreement between LYS, the petitioner and the second respondent;

(iv) a call and put option agreement between the petitioner and Norman Disney & Young of Australia ('NDYA') which gives NDYA an option to purchase the 60,000 shares;

(v) a deed of novation executed by LYS, the petitioner and NDYA whereby LYS assigned all his rights under the loan agreement to NDYA, with the petitioner as the debtor;

(vi) power of attorney given by the petitioner appointing NDYA as the petitioner's lawful attorneys over the 60,000 shares;

(vii) a sale and purchase agreement between LYS and the petitioner for the sale of 5,000 ordinary shares for RM62,400 which constituted a debt owing by the petitioner to NDYA and secured by a charge over the 5,000 shares;

(viii) a loan agreement between the petitioner (as the borrower) and NDYA, as the lender in respect of the 5,000 shares;

(ix) a call option for the purchase the 5,000 shares between the petitioner and NDYA;

(x) a call option agreement between the petitioner and NDYA in respect of 50,000 shares; and

(xi) power of attorneys given by the petitioner appointing NDYA as the lawful attorneys in relation to the 5,000 shares, 10,000 shares and 50,000 shares respectively.

[7] From the above agreements, the petitioner acquired 65% shares of the company, but the company retain control over the shares through powers of attorney, and the company had placed call options over the shares which allow them to call for the shares to be retransferred to them or to their nominees at any time. As such, the 65% shares held by the petitioner were held on trust for NDYA.

THE SUBMISSION OF THE PARTIES

[8] It is the submission of the petitioner that the said agreements which allow the petitioner to own 65% shares of the company are illegal ab initio as they were executed to circumvent the statutory requirements of the Registration of Engineers Act and were contrary to public policy. As such, the carrying on of the business of the company is illegal, and that the company must be wound up in order to terminate the illegality.

[9] However, it is the submission of learned counsel for the respondents, Dato' Davidson that this court should dismiss the petition as this court should not assist the petitioner as he is a party to the fraudulent arrangements and stands to benefit from the winding up of the company. Learned counsel submitted that the courts should refrain from taking sides in the disputes between the fraudulent parties and to leave the enforcement of the laws to the relevant authorities pertaining to the compliance of the Registration of Engineers Act 1967.

THE FINDINGS OF THE COURT

[10] Section 7A(3) of the Registration of Engineers Act 1967 provides that the approval for a body corporate to practise as consulting engineers in Malaysia may only be granted if the body corporate comprises a board of directors who must be professional engineers and have shares held by the members of the board or other persons who are professional engineers.

[11] Section 10(4) of the Registration of Engineers Act 1967 reads as follows:

A (4) Subject to this Act, only a citizen or a permanaent resident of Malaysia may qualify for registration as a Graduate Engineer or Professional Engineer and no person shall be entitled to be registered as a Professional Engineer unless he is at the time of the application for registration, and has been for a period of not less than six months prior to the date of the application, residing in Malaysia.

B

[12] Any attempt to circumvent these statutory requirements would be contrary to ss 24(a) and (b) of the Contracts Act 1950 which reads:

The consideration or object of an agreement is lawful, unless —

C (a) It is forbidden by a law;

(b) It is of such a nature that, if permitted, it would defeat any law;

(c) …

(d) …

D (e) the court regards it as immoral, or opposed to public policy

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

E

[13] I am of the considered opinion that the undisputed fact is that the elaborate scheme which enable the petitioner to own 65% shares of the company, and to hold them on trust for NDYA, is to circumvent the statutory requirements of s 7A(3) and s 10(4) of the Registration of Engineers Act 1967. F As such, the company is carrying on business and is continuing to carry on business in an illegal manner in direct contravention of s 7A(3) and s 10(4) of the Registration of Engineers. Therefore, since the object of the said agreements is against s 7A(3) and s 10(4) of the Registration of Engineers, the said agreements are illegal ab initio.

G

[14] I am also of the considered opinion that the elaborate scheme created an 'AN Baba' type of company where control of the company was still vested in the hands of the foreigners under the powers of attorney. The petitioner is nothing, but more a facade of the company. The establishment of such 'Ali Baba' H companies is illegal as it is against Malaysian public policy, and the said agreements are also illegal ab initio under s 24(e) of the Contracts Act.

[15] The said arrangements between the parties was also considered at length by Justice Lee Swee Seng in *Norman Disney & Young v Affifi Hj Hassan* [2010] I MLJU 543; [2011] 1 CLJ 210. In this suit, the company had sued the petitioner seeking specific performance of the call options when the petitioner failed to comply with the call notices. The petitioner then applied to strike out the suit on the basis that the said arrangements contravened the Registration of Engineers Act 1967.

[16] The petitioner's application was allowed by the learned judicial commissioner on the grounds that said agreements contravene ss 7A(3) and 10(4) of the Registration of Engineers Act which requires all shareholders of a registered company to be a Malaysian citizen or permanent residents. Therefore, the court finds that the said agreements are unlawful under s 24(a) and (b) of the Contracts Act 1950. The court also held that the true intention of the company *was to create an 'Ali Baba' type of company where control of the company was still vested in the hands of the foreigners. The establishment of Ali Baba' companies is illegal as it is against Malaysian public policy*.

[17] So the main issue posed before me is whether it is just and equitable to allow the petition and to wind up the company on the basis that the continuation of the company is premised on illegality. The respondents submits that if this court allowed the petition, then this court is supporting the petitioner's case based on illegality.

[18] I am of the considered opinion, however that the courts are very concerned with the illegality issues and cannot shut its eyes to such illegal acts. In *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1, the Privy Council had, inter alia, held that:

> It is well established as a general principle that the illegality of an agreement sued upon is a matter of which the Court is obliged, once it is appraised of facts tending to support the suggestion, to take notice ex proprio motu and even though not pleaded (see: eg, *Edler v Auerbach*) for clearly, *no Court could knowingly be party to the enforcement of an unlawful agreement*. (Empasis added.)

[19] The Supreme Court in the case of *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281; [1992] 3 CLJ 1667 said this:

> The courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality, and refuse to enforce the contract and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of *whether illegality is pleaded or not* where the contract is ex facie illegal.
>
> (Emphasis added.)

[20] In *Thong Foo Ching & Ors v Shigenori Ono* [1998] 4 MLJ 585; [1998] 4 CLJ 674 Siti Norma Yaakob JCA held this:

> the illegality of an agreement sued upon, in any case, is a matter which the court is obliged to take notice of ex proprio motu, once it is apprised of facts tending to support the suggestion. *No court would knowingly be party to the enforcement of an unlawful agreement*. And that as the arrangement between the parties is illegal and

A the illegality is not only with regard to its performance but in its very inception, such arrangement is void ab initio and the parties were outside the pale of the law.

(Emphasis added.)

B **[21]** As such, this court is duty bound to address the illegality issue (even if the same is not pleaded), regardless of whether the fraudulent party is set to be the ultimate beneficiary. In the present case however, the petitioner, the company and the first respondent are privy to the fraudulent and illegal acts. On the illegality issue, I am of the considered opinion that if the winding up C order is not granted, the company would continue to exist and carry on its business in blatant disregard of the Registration of Engineers Act 1967. To allow the company to continue operation would tantamount to a continuing illegality and this is clearly against the Registration of Engineers Act 1967. In *Lim Yoke Kian & Anor v Castle Development Sdn Bhd* [2000] 4 MLJ 443; [2000] D 3 CLJ 369, the Court of Appeal held that the High Court judge fell into error when he refused to grant the winding up order as the intention to defer the winding up proceedings was to minimise the payment of income tax which was clearly an illegality. Therefore, the court must act on the illegality, and if the illegality can be terminated through the winding up proceedings, then the E orders must be granted.

[22] In *Re Thomas Edward Brinsmead & Sons Ltd* [1897] 1 Ch 406, the court held that the 'just and equitable ground' to wind up a company is sufficiently wide enough to encompass situations where the business of a company is F carried on for illegal purpose. At p 420, the Court of Appeal said this:

In our judgment *it has been proved that this company* — ie Thomas Edward Brinsmead & Sons, Limited — *was initiated to carry put a fraud, and that, until restrained by injunction, it continued therein*; and that a strong prima facie case has G been made out that Consolidated Contract Corporation are at the present moment dishonestly keeping the shareholders' money to which the shareholders, and not they, are entitled, and are resisting the petition to wind up in order to continue to do so, If the sums which they have improperly obtained from the company can be recovered from them, there will probably be something to distribute among the shareholders, and, although the petitioner is a fully paid-up shareholder, he cannot H be said to have no locus standi. The company is hopelessly embarrassed by the actions already brought against it, and there will, no doubt, be many more of the same sort if this petition is dismissed; and if it is not wound up 35,000 obtain from it by its promoters will remain in their hands.

I Although the words 'just and equitable' have had a narrow construction put upon them, they have never been construed so narrowly as to exclude such a case as this. *If ever there was a case in which it was just and equitable that a company should be wound up by the Court, we cannot doubt that that case is this case*.

(Emphasis added.)

[23] On the issue raised by the respondents that the petitioner is privy to the illegality, it does not have any bearing as this court cannot endorse the existence of a company tainted with illegality. In this case, it is not so much that the court is enforcing the petitioner's rights, but rather, the court is just upholding the law.

On this issue I agree with the findings of Justice Mah Weng Kwai in *Perbadanan Pertanian Selangor v Megafores Sdn Bhd & Ors* [2010] MLJU 1572; [2011] 8 CLJ 484, where His Lordship held that it does not matter that the petitioner was a party to the illegality. Once the illegality was discovered, the court has a duty to act on it. In para 6.2.1, His Lordship added:

> The court now having been appraised of the illegality cannot look sideways and ignore the existence of the illegality. The illegality is fundamental and renders the petitioner's investments in the 1st respondent void ab initio for illegality.

[24] On the respondent's submission on alternative remedy, the buyout proposal, applying the decision of the Supreme Court in *Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd* [1995] 1 MLJ 769, I am of the considered opinion that there is no provision in Act 125 which requires the court to consider the availability of alternative remedy before making a winding up order.

[25] In the premise, I am of the considered opinion that it was just and equitable to wind up the first respondent company pursuant to s 218(1)(i) of Act 125 on the grounds that the carrying on of business by the company is illegal and in breach of the statutory requirements of the Registration of Engineers Act 1967. As such, I had made the order that first respondent company be wound up.

Application allowed.

Reported by Afiq Mohamad Noor